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CHARLES ELMORE CROPLEY

In the Supreme Court of the United States

OCTOBER TERM, 1949.

No. 533

THE LINCOLN ELECTRIC COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Sixth Circuit, and BRIEF IN SUPPORT.

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January 3, 1950.

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INDEX.

PETITION FOR WRIT OF CERTIORARI..... 1
Matter Involved 1
Jurisdiction 13
Questions Presented 13
Reasons Relied on for Allowance of Writ..... 14
1. The case raises an important question of construction of the revenue law which has not been, but should be, settled by this Court... 14
2. The decision below is in conflict with the decisions of this Court relating to the finality of judgments 16
3. The court below has departed from the accepted and usual course of judicial proceedings 17
Conclusion 19

BRIEF IN SUPPORT OF PETITION..... 21
Opinions Below 21
First review 21
Second review 22
Jurisdiction 22
Statement of Facts 22
Specification of Errors 23
Argument 23
Reasons relied on for allowance of writ..... 23
I. Case raises important question of contion of revenue law which has not been but should be decided by this Court..... 23
II. Decision below is in conflict with decisions of this Court relating to finality of judgments 27
III. Court below has departed from accepted and usual course of judicial proceedings.. 28
Conclusion 29

TABLE OF AUTHORITIES.

Cases.

Botany Worsted Mills v. United States (1929), 278 U. S. 282 25

Briggs v. Pennsylvania Railroad Co. (1948), 334 U. S. 304 .....17, 27

du Pont, Deputy v. (1940), 308 U. S. 488..... 26

Flowers, Commissioner v. (1946), 326 U. S. 465..... 26

Gulf Refining Company v. United States (1925), 269 U. S. 125 27

Limericks, Inc. v. Commissioner (5 C. C. A., 1948), 165 F. (2d) 483 26

Lincoln Electric Co. v. Commissioner, 6 T. C. 37, 162 F. (2d) 379; *Commissioner v. Lincoln Electric Co.,* 176 F. (2d) 815 .....1, 22

Metropolitan Water Company v. Kaw Valley Drainage District (1912), 223 U. S. 519 .....17, 27

United States v. Philadelphia Knitting Mills Co. (3 C. C. A., 1921), 273 Fed. 657 25

Constitution.

Sixteenth Amendment 14, 16

Statutes.

Federal Judicial Code, 28 U. S. C. A. §§ 1254(1), 2101 (c) 13, 22

Internal Revenue Code:

Sec. 22 3

Sec. 23(a) 3

Sec. 23(a)(1)(A) 2, 13, 14, 23

Revenue Act of 1913, ch. 16, 38 Stat. 114, 172, § IIG (b) 14

Revenue Act of 1918, ch. 18, 40 Stat. 1057, 1077, § 234 (a)(1) 14

Regulations.

Reg. 103, Sec. 19.22(a)-5 3

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review the judgment entered August 29, 1949, in cause No. 10,728 on its docket, entitled *Commissioner of Internal Revenue, Petitioner, v. The Lincoln Electric Company, Respondent,* wherein the court, one judge dissenting, reversed the decision of the Tax Court.

MATTER INVOLVED.

This is a tax case.

It involves the labor-management incentive system of The Lincoln Electric Company. The company, located in Cleveland, Ohio, is engaged in the manufacture of electric arc welding machines, electrodes and supplies.

The case has been twice in the Court of Appeals.[1]

[1] Volumes I, II and III of the record constitute the record upon the first review by the Court of Appeals. They were by stipulation made part of the record upon the second review now here (R. Vol. IV, p. 118). Volume IV contains the proceedings in the Court of Appeals upon the first review, the further proceedings in the Tax Court upon the remand, and the subsequent proceedings in the Court of Appeals upon the second review, to which this petition for writ of certiorari is directed.

The case turns on Internal Revenue Code § 23(a)(1)-(A). This statute for 30 years has provided, as it does now, that, in computing income subject to tax, deduction "shall be allowed" for:

> "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered * * *."

The payments in question are premiums paid in 1941 upon an employees' group retirement annuity policy (R. Vol. III, p. 637) and to an employees' trust (R. Vol. III, p. 680). The annuity policy, issued by Sun Life Assurance Company of Canada, was taken out by the taxpayer in 1936 upon the suggestion of the Employees' Advisory Board. The Board, organized in 1914, consists of 26 members of which 22 are workers in the plant. The policy covers every person in the company's employ. The entire cost is paid by the taxpayer. The trust, likewise instituted at the suggestion of the Employees' Advisory Board, covers every employee except salesmen, the president, and the chairman of the board. No part of the money paid upon the annuity and the trust can be repaid to the company. (R. Vol. IV, pp. 108-11.) For these purposes the company paid the following sums (R. Vol. I, p. 23):

Year	Annuity	Trust
1936	$ 486,389	
1937	359,804	
1938	99,931	
1939	132,252	
1940	400,009	
1941	575,206	$1,000,000
Total	$2,053,591	$1,000,000

The payments in 1936, 1937, 1938 and 1939 were allowed by the Commissioner. The payments for both 1940 and 1941 were initially challenged in this case, but, after

the decision of the Court of Appeals upon the first review, the 1940 payment was allowed. The 1941 payments alone remain in question.[2]

The taxpayer claimed these payments alternatively as:

"(1) compensation paid for personal services actually rendered; or

(2) ordinary and necessary expenses paid in carrying on a trade or business; or

(3) an item of the cost of goods sold"[3] (R. Vol. IV, p. 122).

The Tax Court, over the dissent of Judges Van Fossan, Smith and Black, denied the claim on all grounds (R. Vol. I, p. 20). The Commissioner had raised also an alternative issue that, if the 1941 payments should be held to be compensation, then, in part, they would be unreasonable in amount, but only in the case of 438 employees (all but 34 of them factory hands) out of a total of 979 (R. Vol. III, pp. 612, 613, 620-35; Vol. II, pp. 87-8; Vol. I, pp. 34, 43). This would have resulted in disallowance of $1,055,547 out of the $1,575,206 paid on the annuity and trust in 1941. It would have allowed $519,659 (R. Vol. III, pp. 612, 613, 635).

The Tax Court, however, having denied the payments on all grounds, found it unnecessary to pass on the alternative issue. The Tax Court held:

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[2] The Court of Appeals noted: "The record provides no clue as to why the Commissioner allowed deductions for annuity premiums from 1934 to 1939 as ordinary expenses or reasonable compensation, yet declined to do so in 1940 and 1941 though the earlier contributions were comparable in amount. * * * We understand, of course, that the Commissioner may not be constrained to constancy by any rule of estoppel, but reason and logic might have been expected to justify so complete a change of front." (R. Vol. IV, p. 117.)

[3] If the payments constituted part of the cost of goods sold, then they would be taken into account in computing gross income under Internal Revenue Code § 22 and Reg. 103, § 19.22(a)-5, thereunder, which says that "In the case of a manufacturing * * * business, 'gross income' means the total sales, less the cost of goods sold * * *." In that case § 23(a), which provides for deductions from gross income, would not come into operation.

"In view of our conclusion that the disbursements in dispute did not constitute compensation paid for services rendered, any question of their reasonableness becomes moot" (R. Vol. I, p. 43).

The Court of Appeals unanimously reversed, Judges Simons, Hicks and Allen sitting (R. Vol. IV, p. 107).

The Court of Appeals pointed out that the payments in question were part of the taxpayer's incentive system whereby, in the eight-year period ending in 1941:

"the productivity of the individual employee, measured in terms of units produced, *increased more than threefold,*

the hours of direct labor required to manufacture a given unit was *cut in half,*

the selling price of its product was reduced by nearly *one-half,*

the dividends per share of stock were more than *tripled* and

the earned surplus and undivided profits *doubled*" (R. Vol. IV, p. 109).[4]

The court noted:

"the taxpayer's incentive system, including its high piecework rate, the bonus, the annuity plan and the trust fund were responsible for these results, through a high degree of labor-management cooperation" (R. Vol. IV, p. 109).

The result of this policy, in terms of savings to the American people—the company's customers—is illustrated in the graphs commencing on the opposite page. Prices have been steadily reduced. The significance of this is emphasized when it is noted, as shown on the graphs, what has happened in the same period to the prices of products of industry generally.

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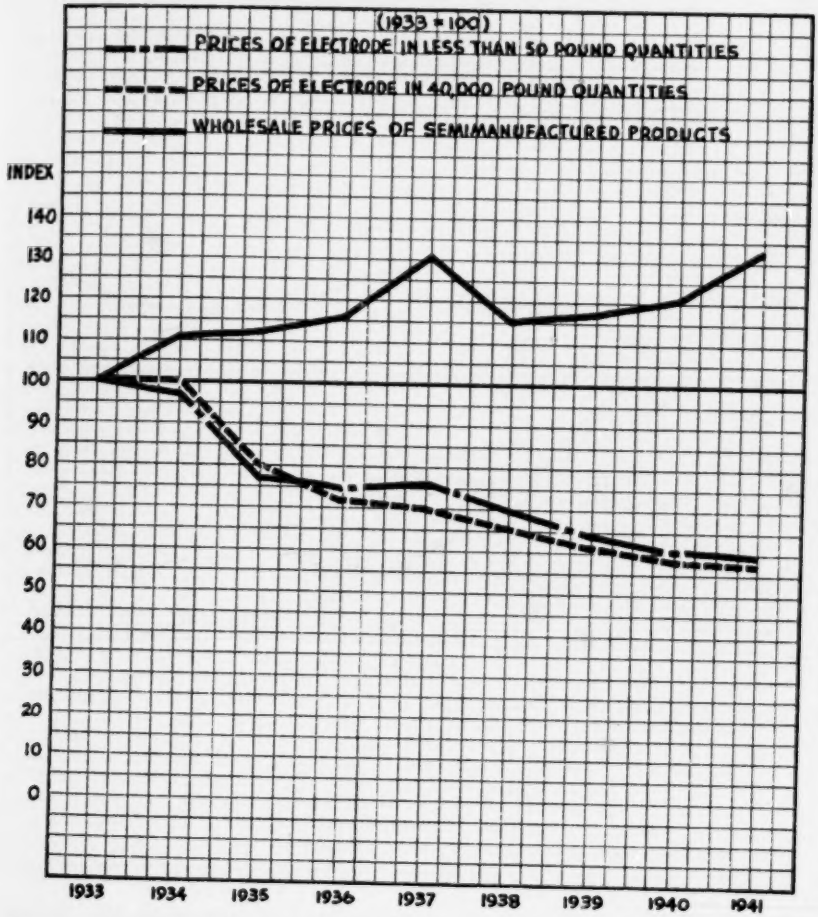
[4] Emphasis supplied throughout.

EXHIBIT 62, R. Vol. III, p. 789.

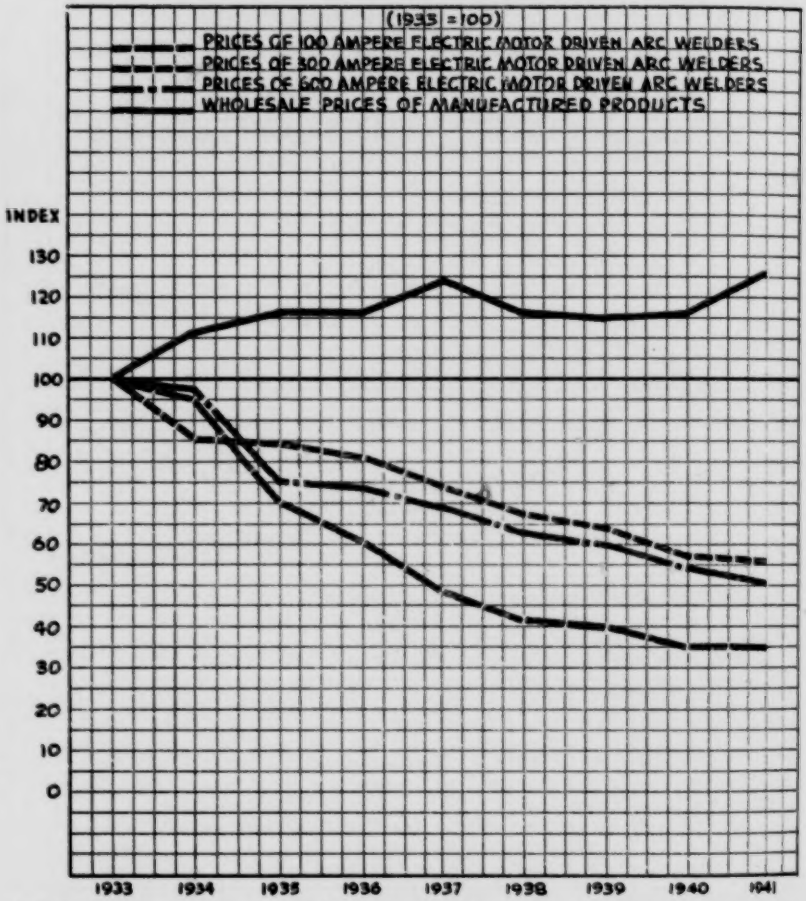
Lincoln Electrode Selling Prices Compared with Wholesale Prices of Semi-Manufactured Products.



Although wholesale prices of semi-manufactured products in the United States rose, as shown by the top line, the company, in the same period, was able to reduce the selling prices of its semi-manufactured products—electrodes—as shown by the two lower lines.

EXHIBIT 63, R. Vol. III, p. 791.

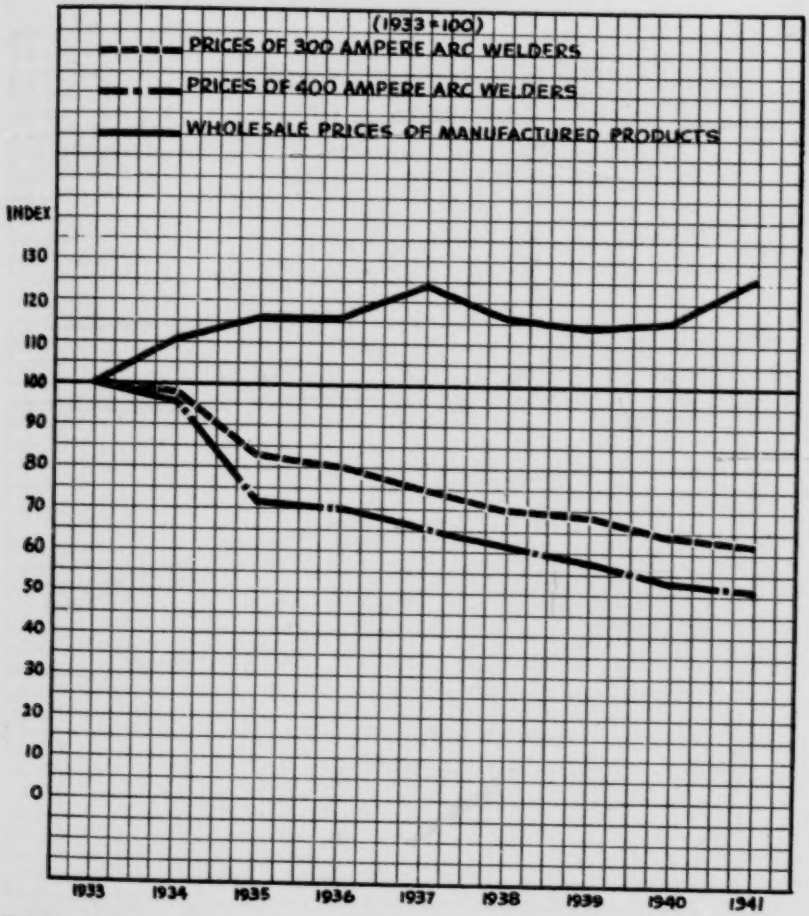
Lincoln Motor-Driven Welder Prices Compared with Wholesale Prices of Manufactured Products.



While wholesale prices of manufactured products in the United States increased, as shown by the top line, the company, in the same period, found it possible to reduce the selling prices of its manufactured products—i.e., electric motor-driven welders—as shown by the three bottom lines.

EXHIBIT 64, R. Vol. III, p. 793.

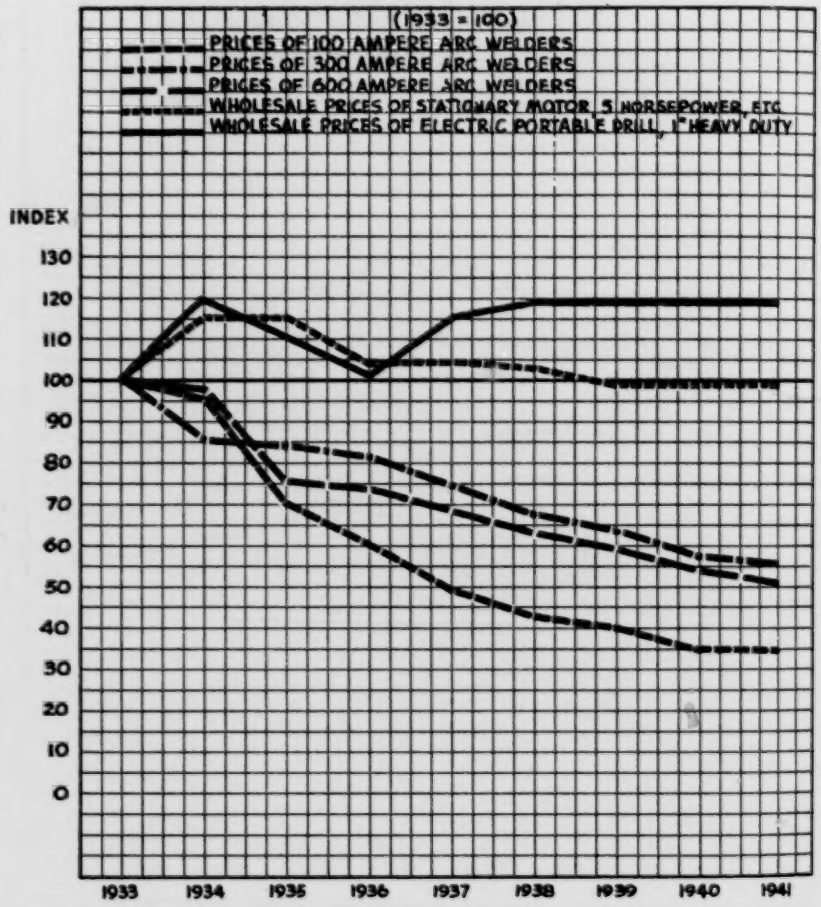
Lincoln Gasoline Engine-Driven Welder Prices Compared with Wholesale Prices of Manufactured Products.



While wholesale prices of manufactured products followed the pattern shown by the upper line, the company was able, in the same period, to reduce the prices of its manufactured products—in this case gasoline-driven welders—as shown by the two lower lines.

EXHIBIT 65, R. Vol. III, p. 795.

Lincoln Motor-Driven Welder Prices Compared with Average Annual Wholesale Prices of Specified Types of Electrical Machinery.



The price behavior of electrical machinery, electric motors and an electric drill, is shown by the two upper lines; price reductions on the company's electric motor-driven welders are shown by the three bottom lines. A welding machine is in substance an electric motor, to supply the power, joined to another having its windings modified to produce the current required for welding, with additional appliances and attachments.

What this policy has meant to the company and its shareholders in increased earnings—and to the United States in increased taxes—is reflected in the following table (Ex. 20, R. Vol. III, p. 727):

Year	Net Income		Dividends Paid per Share[5]
	Before Taxes	After Taxes	
1934	$1,636,543	$1,411,543	$2.50
1935	1,904,649	1,641,649	5.50
1936	2,414,050	1,949,050	6.00
1937	2,944,683	2,336,183	6.00
1938	1,604,525	1,334,525	5.00
1939	2,459,974	2,019,974	6.00
1940	3,239,755	2,189,755	6.50
1941	5,720,919	2,865,919	8.00

The company has prospered (R. Vol. II, pp. 104-12). Its growth has been on the following order (R. Vol. I, p. 22):

Year	Assets	Capital Stock	Paid-in Surplus	Earned Surplus and Undivided Profits
1936	$ 6,686,219	$224,190	$ 620,647	$3,351,927
1937	8,195,281	227,722	859,275	4,477,074
1938	8,055,249	230,246	1,033,431	4,659,151
1939	9,884,225	232,104	1,161,633	5,309,703
1940	11,045,426	234,226	1,308,051	6,017,085
1941	12,657,342	234,226	1,308,051	7,041,123

Of this the Court of Appeals took note. Speaking of the incentive system which brought these things to pass, the court pointed out:

> "there was more than a strain of constancy in the plan. It was first in a small way projected as early as 1918, more fully developed in 1934, liberalized in succeeding years and added to greatly in 1941. It was pursued during an era when mass production methods were developing at incredible speed, when the best engineering brains in industry were dedicated to improvement

[5] The number of shares outstanding during this period remained substantially the same (R. Vol. I, p. 22; Vol. II, pp. 109-10).

in tools and machines and when labor was becoming conscious of some claim to the results of labor-saving devices and increasingly vocal in demand for greater remuneration and shorter hours. It was a period of labor unrest and the petitioner was not alone in seeking means to inspire in its labor force that spirit of loyalty, efficiency and cooperation that should avoid labor strife. The Tax Court pays tribute to the success of the effort. In the words of the *Welch* case [290 U. S. 111], 'payments for such a purpose are the common and accepted means of offense against attack.'" (R. Vol. IV, p. 115.)

The court noted further:

"These measures were pursued in an era when there was increasing development among workers, of a group consciousness manifested in the rapid growth of industrial unions, their demand for collective bargaining and increasingly individual sacrifice to the inviolability of the picket line. Advantage to the group had become more important than individual advantage. Moreover, as industrial units grew large the greater became the injury that might flow from labor strife, and the greater the incentive of forward looking management to seek means to avoid it. In the light of the concept of ordinary expense developed in the *Welch* case, even though not applicable to the facts there disclosed, we are unable to say that the petitioner's outlay for employee benefit, considering its purpose and the clearly demonstrated effectuation of that purpose through a course of years, was not an ordinary expenditure within the meaning of the statute." (R. Vol. IV, p. 116.)

Accordingly, the Court of Appeals held the payments constituted "ordinary and necessary expenses" within the meaning of this statute (R. Vol. IV, pp. 113-6). It refused to hold the payments constituted "compensation for personal services" (R. Vol. IV, p. 117).

The Commissioner did not seek review. The judgment of the Court of Appeals became final. All that remained was to compute the tax.

Upon return of the case to the Tax Court, the Commissioner—in face of the reviewing court's refusal to hold the payments constituted compensation—asked the Tax Court "to pass upon the question of the reasonableness of the payments *as compensation*" (R. Vol. IV, pp. 7, 13, 17, 22, 47). The motion was to "decide the question of the reasonableness of the claimed deductions" (R. Vol. IV, p. 8). This ruling was sought "for reasons more particularly set forth in a memorandum brief hereto attached and made a part hereof" (R. Vol. IV, p. 8). The ground assigned was that the reviewing court:

> "has not laid at rest the question of the reasonableness of the amount of the deduction claimed, **if it is in the nature of compensation.** The question which must be decided, therefore, is whether the court regarded the payments as in the nature of compensation *or deemed them allowable as expenses of some class other than compensation*" (R. Vol. IV, p. 13).

Accordingly, the Tax Court understood that it was asked "to pass upon the question of the reasonableness of the payments *as compensation*" (R. Vol. IV, p. 47).

It is important to note that the Commissioner did not ask the court to rule on the reasonableness of the payments treated as "ordinary and necessary expenses." That issue never had been raised in this case. The Commissioner never had attacked the payments on that ground (R. Vol. III, pp. 612, 613; Vol. II, pp. 87-8; Vol. I, p. 34; Vol. IV, pp. 10, 131-5). Instead, the Tax Court was asked to pass on the amount only *"if it is in the nature of compensation"* (R. Vol. IV, pp. 13, 7-43).

The Tax Court, Judge Leech sitting, refused (R. Vol. IV, pp. 47, 49). The reviewing court had not allowed the payments "as compensation." It had refused so to hold. Said the Tax Court:

> "It is accordingly our view that we are without jurisdiction, under the opinion and mandate of the Circuit Court, to consider further any question as to the

reasonableness of the contested payments *as compensation*" (R. Vol. IV, p. 49).

The Commissioner thereupon sought review in the Court of Appeals.

On the second review, now here, the Court of Appeals, Judge Miller having replaced Judge Simons, and sitting with Judges Hicks and Allen, adhered to the holding that the payments are "ordinary and necessary expenses" (R. Vol. IV, p. 124). The court rejected the Commissioner's argument that the payments were, or were held to be, compensation. It said:

> "We * * * reject the Commissioner's * * * contention that although we classified the payments as ordinary and necessary expenses they were also compensatory in nature and so limited to a reasonable amount" (R. Vol. IV, p. 124).

Thus, the court rejected the sole basis of the motion. But the court reversed the Tax Court.

Judge Allen dissented.

The majority ruled "The motion of the petitioner [i.e., the Commissioner] should have been sustained" (R. Vol. IV, p. 126).

The majority reached this conclusion by holding that the provision for

> "a reasonable allowance,"

which the statute confines to "salaries or other compensation," applies also to payments held to be "ordinary and necessary expenses" of a business.

The result is that, even though the payments *are* "ordinary and necessary expenses"—as the Court of Appeals now twice has held—and even though the statute in mandatory language says "All" such expenses "*shall be allowed*," the taxpayer can claim them only to the extent that in the Commissioner's opinion allowance thereof is "reasonable." The Commissioner thus is made a super-

manager for the nation's business. To him—which means in practical operation the numerous agents of revenue abroad in the land—is given the power to say which, and how much, if any, of the "ordinary and necessary expenses" of carrying on a trade or business shall be allowed.

If this be law, then a great change will have been worked in a vital statute, the meaning of which has been settled for years. This will have been done by (1) rewriting the statute, (2) overturning the settled rule designed to leave in repose conclusions once embodied in a final judgment, and (3) convicting the Tax Court of error in a ruling it neither made nor was asked to make. Thus, there has been introduced into this case a new issue, and into the law a new principle.

JURISDICTION.

This Court has jurisdiction to review the judgment in question upon writ of certiorari, under §§ 1254(1) and 2101(c) of the Federal Judicial Code. 28 U. S. C. §§ 1254-(1), 2101(c).

The judgment was entered August 29, 1949 (R. Vol. IV, p. 119). Petition for rehearing (R. Vol. IV, p. 131), duly filed, was overruled without opinion on October 12, 1949 (R. Vol. IV, p. 143).

QUESTIONS PRESENTED.

The questions presented are:

1. Whether payments, held not to be compensation but instead adjudged to be "ordinary and necessary expenses" of carrying on a business within the meaning of Internal Revenue Code § 23(a)(1)(A), are subject to the further test of "a reasonable allowance" which the statute in terms confines to "compensation for personal services actually rendered."

2. Whether a final judgment entered by a court of appeals, of which no review was sought, may be reexamined in any subsequent proceeding in the same case.

3. Whether the Tax Court may be convicted of error for a ruling it neither made nor was asked to make.

REASONS RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI.

The reasons relied on for allowance of the writ prayed for are:

1. The case raises an important question of construction of the revenue law which has not been, but should be, settled by this Court. The statute, Internal Revenue Code § 23(a)(1)(A), applies to every business filing a tax return. It says that in computing income subject to tax "there shall be" allowed as deductions "*All* the ordinary and necessary expenses" of carrying on business.

This provision initially came into the law in 1913.[6] It was in the first income tax law passed following adoption of the Sixteenth Amendment.

The Court of Appeals has amended this statute.

It has declared a principle heretofore unknown.

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[6] The 1913 Act authorized the taxpayer to deduct:

> "all the ordinary and necessary expenses paid within the year in the maintenance and operation of its business" (Act of October 3, 1913, ch. 16, 38 Stat. 114, 172, § IIG (b)).

In the Revenue Act of 1918 Congress added the provision for "a reasonable allowance for salaries." The statute, as then amended, authorized deduction, as it does today, of:

> "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered" (Act of February 24, 1919, ch. 18, 40 Stat. 1057, 1077, § 234(a)(1); this continues in effect as present Internal Revenue Code § 23(a)(1)(A)).

It has held, reversing the Tax Court, that payments the court twice has held to be "ordinary and necessary expenses"—and which it refused to hold constituted compensation—are subject to further test to determine what is "a reasonable allowance" therefor. The statute confines that test to the "allowance" the statute directs to be made for "salaries or other compensation for personal services actually rendered."

In so holding the court has put in disorder the law concerning "ordinary and necessary expenses," to which every business in the land is subject, and which since 1913 has had the settled meaning that expenses, established to be "ordinary and necessary expenses" must be allowed because the statute, without equivocation, says they "shall be allowed."

Heretofore it has been in the Commissioner's power to determine whether a claimed deduction is in fact an "ordinary and necessary" expense of carrying on the taxpayer's business, or whether it is something else traveling in borrowed garb. To this the court below now has added the further power to say how much of that expense, conceded to be an "ordinary and necessary" expense, shall be allowed. If the Commissioner may disallow part, because he thinks it more than the taxpayer *should* have paid, then he can disallow all. Thus the congressional command that "*All*" such expenses "shall be allowed" is repealed.

This has two consequences of far-reaching importance.

First. It works, without congressional approval, an enormous expansion in the Commissioner's powers. It bestows upon the Commissioner, and his agents throughout the land, a control over the internal management of business affairs which Congress has seen fit to withhold. Had Congress intended to subject to the Commissioner's opinion the amount it is "reasonable" to allow for expenses adjudged to be "ordinary and necessary expenses" of a business, it would have said so.

Second. The decision, without change in the statute by Congress, alters the system of income taxation in this country. It transforms a system designed to impose a tax on income, as authorized by the Sixteenth Amendment, to one imposing a tax upon a fictitious computation which differs from gross receipts only as the Commissioner may determine that a given payment, conceded to be part of the "ordinary and necessary expenses" of a business, is or is not in his opinion reasonable. Such power Congress has not conferred upon the Commissioner. Before it is sealed this Court should examine the right of the claim.

As Circuit Judge Allen, dissenting, noted:

> "This conclusion [of the majority] reads into the statute a limitation which in my judgment does not exist there" (R. Vol. IV, p. 127).

The decision, moreover, threatens with extinction, and certainly with penalties, a system of employee-management relations which, many think, offers the only solution to industrial turmoil, and to which industry, more and more, is turning. Certainly any system which can bring about threefold increase in output, as this has, deserves better than to be strangled by distorted construction of a Revenue Act.

2. The decision below is in conflict with the decisions of this Court relating to the finality of judgments. The Court of Appeals, long after term and long after expiration of time for review, has reopened, and added qualification to, a prior final judgment of which no review or other correction was sought. On the first review the court held the payments in question constituted "ordinary and necessary expenses." Nothing remained but to compute the tax. The judicial process was complete. The Commissioner sought no review. Accordingly when term and time for review passed, that judgment remained "binding upon the Circuit Court and every other court to which the case could

by any possibility be taken." *Metropolitan Water Company v. Kaw Valley Drainage District* (1912), 223 U. S. 519, 523, 524. If any modification of it were possible, "it could be done only by amendment of the mandate. But no move to do this was made during the term at which it went down." *Briggs v. Pennsylvania Railroad Co.* (1948), 334 U. S. 304, 305, 306. As Circuit Judge Allen, dissenting, observed:

> "The judgment of the court in effect grants a rehearing of a case in which final judgment has been rendered and from which no review proceedings were prosecuted" (R. Vol. IV, p. 127).

3. The court below has departed from the accepted and usual course of judicial proceedings, with disturbing consequences to any orderly process for settlement of controversy. Under the decision the Tax Court is now required either:

(a) to pass on the payments "as compensation," for it was the Tax Court's refusal to pass on the payments "as compensation" which has been reversed, or

(b) to decide how much it is reasonable to allow for expenses twice adjudicated to be "ordinary and necessary expenses" of this taxpayer's business, "All" of which the statute says "shall be allowed."

If the former, then the Tax Court in dealing with the payments "as compensation" must proceed in face of the opinion of the Court of Appeals rejecting the Commissioner's contention that the payments were "compensatory in nature and so limited to a reasonable amount" (R. Vol. IV, p. 124). If this case, now seven years in litigation, has settled anything, it is that the payments are *not* compensation. The taxpayer urged that the payments (if not allowable as ordinary and necessary expenses or as part of the

cost of goods sold) constituted "compensation." The reviewing court refused so to hold. But it did hold they were "ordinary and necessary expenses." Thereupon the Commissioner, who on the first review had argued that the payments were not compensation, argued upon the second review that they *were* compensation. This contention the Court of Appeals also rejected. Both parties thus have been told the payments are not compensation. But the Tax Court nevertheless is reversed. Manifestly, if the decision of the Court of Appeals requires—as it appears to do because the ruling is "The motion of the petitioner [i.e., the Commissioner's motion calling upon the Tax Court to pass on the payments "as compensation"] should have been sustained" (R. Vol. IV, p. 126)—then the Tax Court has been reversed for a ruling the Court of Appeals says was right.

On the other hand, if the Tax Court now is to determine what would be a reasonable allowance for expenses twice adjudicated to be "ordinary and necessary expenses" of this taxpayer's business—"All" of which the statute says "shall be allowed"—then the Tax Court has been reversed for a ruling it did not make, upon an issue it was not asked to pass upon, which never was raised in the case, and which was not open under the pleadings. The Court of Appeals has introduced a new issue into the case. It has issued a new statutory notice of deficiency. Not even the Commissioner could do this, his power having been exhausted with the first.

In short, the reviewing court either (a) has reversed the Tax Court for abiding by the reviewing court's opinion, or (b) has convicted the Tax Court of error for a ruling never made upon a motion never presented. In either case the court below has so far departed from the accepted and usual course of judicial proceedings as to make it proper for this Court to examine what has been done.

CONCLUSION.

The writ should issue (1) to settle the meaning of an important statute which the decision below has thrown into confusion with disturbing results to the fabric of the law, (2) to enforce the wholesome requirement that a final judgment shall be respected even by the court which entered it, and (3) to compel adherence to an orderly process for the disposition of contested issues.

Respectfully submitted,

THE LINCOLN ELECTRIC COMPANY,
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January 3, 1950.

In the Supreme Court of the United States

OCTOBER TERM, 1949.

No. .....

THE LINCOLN ELECTRIC COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

After 30 years of settled construction, the Court of Appeals has given to an important statute a new and disturbing meaning with far-reaching consequences. The court has delegated to revenue agents throughout the land power, withheld by Congress, to say how much, if any, allowance is to be made to a taxpayer for expenses adjudged to be "ordinary and necessary expenses" of a business in computing income subject to tax. Congress has said "All" such expenses "shall be allowed."

OPINIONS BELOW.

The opinions of the courts below may be found:

First Review.

The initial opinion of the Tax Court, three judges dissenting (R. Vol. I, p. 20), holding the payments in question not allowable on any of the three grounds on which they were claimed, and holding it unnecessary, therefore, to pass on the alternative issue whether the payments, if

held to be compensation, were, in the case of 438 out of 979 employees, within the "reasonable allowance" authorized by statute, is reported in **6 T. C. 37.**

The opinion of the Court of Appeals, Judges Simons, Hicks and Allen (R. Vol. IV, p. 107), reversing the Tax Court, and holding the payments constituted "ordinary and necessary expenses," is reported in **162 F. (2d) 379.**

Second Review.

The opinion of the Tax Court, Judge Leech sitting, upon return of the case to the Tax Court, holding that under the reviewing court's opinion and mandate the court was without jurisdiction "to consider further any question as to the reasonableness of the contested payments as compensation," and accordingly overruling the Commissioner's motion to reexamine the payments, has not been officially reported. It has been published in 6 TCM 1218, CCH Dec. 16,136 (M), and in 1947 (P.-H.) T. C. Memo. Dec., Vol. 16, ¶ 47,320. It appears in Record Volume IV, page 47.

The opinion of the Court of Appeals, Judges Miller and Hicks concurring, and Judge Allen dissenting (R. Vol. IV, p. 121), reversing the Tax Court, and holding that the payments, although they are "ordinary and necessary expenses," are nevertheless subject to further inquiry, is reported in **176 F. (2d) 815.**

Petition for rehearing (R. Vol. IV, p. 131) was denied without opinion on October 12, 1949 (R. Vol. IV, p. 143).

JURISDICTION.

Jurisdiction to review exists under §§ 1254(1) and 2101(c) of the Federal Judicial Code. 28 U. S. C. §§ 1254(1) and 2101(c).

STATEMENT OF FACTS.

The essential facts are set forth in the petition.

SPECIFICATION OF ERRORS.

The Court of Appeals erred:

1. In reversing the decision of the Tax Court.
2. In holding payments, held not to be compensation but instead adjudged to be "ordinary and necessary expenses" of carrying on business within the meaning of Internal Revenue Code § 23(a)(1)(A), are subject to the further test of "a reasonable allowance" which the statute in terms confines to "compensation for personal services actually rendered."
3. In qualifying the final judgment entered by the Court of Appeals upon the prior review.
4. In reversing the Tax Court upon a ruling it neither made nor was asked to make.

ARGUMENT.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

The Court should grant the writ prayed for because:

I. CASE RAISES IMPORTANT QUESTION OF CONSTRUCTION OF REVENUE LAW WHICH HAS NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT.

The statute since 1913 has authorized the taxpayer, in computing income subject to tax, to deduct "All the ordinary and necessary expenses" of carrying on business. In the 1918 act Congress added the provision for "a reasonable allowance for salaries or other compensation for personal services actually rendered." Thus the statute now provides, as it has for 30 years, that "there shall be allowed"—

> "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered" (Internal Revenue Code § 23(a)-(1)(A));

The question is: Are payments which are "ordinary and necessary expenses" of carrying on business—as the court below twice has held, and which it refused to hold are "compensation"—subject to further review by the Commissioner to determine what is "a reasonable allowance" therefor?

The court below thought, although Congress has not said so, and although the statute confines the "reasonable allowance" provision to compensation, that such payments are subject to that further test. This means that every expenditure business makes is henceforth subject, not only to inquiry whether it is in truth what it purports to be, but to further inquiry whether the taxpayer paid too much.

This is a very great power. It is a new step toward a government of men, not law. And it may fairly be doubted whether revenue agents are by any natural aptitude especially qualified to say for a myriad of businesses what amount it is proper for business to lay out upon an expense conceded to be both "ordinary and necessary." In any event, the question, whether the power to do so exists under the statute, is one of large and obvious importance. It is one thing to determine whether a claimed expenditure is in truth an "ordinary and necessary" expense; it is quite another to say how much that expense may be.

The power so to disallow becomes too easily a tool for compelling surrender of otherwise lawful claims on pain of loss of those over which the agent has discretionary power, or for exacting from one what is not exacted from another. The exercise of the power—because in practical operation it must be delegated to many hands—cannot be uniform. And unless Congress compels that result—which itself would seem to raise serious question, for it is only income which may be taxed—a court should not hasten to that result by giving to the statute a new rendering after more than 30 years during which the power has been disowned.

Congress has been content with the reading given the statute in all that period of time. There is no reason, therefore, why a court should write its discontent into law.

The divided court below, however, thought its conclusion, if not compelled, at least directed by three cases to which it referred, two from this Court. These cases have been misread.

If anything, *Botany Worsted Mills v. United States* (1929), 278 U. S. 282, to which the court below referred, casts doubt on the meaning the Court of Appeals has written into the statute. That case dealt with compensation. It arose prior to the time the statute was amended to provide for "a reasonable allowance" for salaries. The Court expressly refused to decide whether the amounts paid could be disallowed (p. 292):

> "merely because, and to the extent that, as compensation, they are unreasonable in amount."

What the Court held was that a payment "in the guise and form of compensation" but having no relation to services performed (p. 293):

> "was not in fact compensation for services, but merely a distribution of a fixed percentage of the net profits that had no relation to the services rendered."

Indeed, even as to compensation, prior to the amendment of the statute to provide for "a reasonable allowance for salaries," it was settled, as the court pointed out in *United States v. Philadelphia Knitting Mills Co.* (3 C. C. A., 1921), 273 Fed. 657, that (p. 658):

> "the Government has no right (until expressly granted by statute) to inquire * * * whether they are too much or too little. But * * * the Government may inquire *whether the amount paid is salary or something else.* * * * It has a right, therefore, to * * * show by evidence, not that a given salary is too much, but that, in the circumstances, the whole or some part of it is not salary at all * * *."

It was primarily from *Commissioner v. Flowers* (1946), 326 U. S. 465, that the court below derived the rule it applied. This Court there pointed out that only "reasonable" traveling expenses can be allowed. The court below misread this to refer to the amount. But this Court in *Flowers* (which held that a lawyer, living in Mississippi and practicing in Alabama, could not deduct the expenses of traveling from the one place to the other, because they were personal expenses) was not talking about amount. The amount was not even in question. The Court, as the context shows, was talking about the *class* or *kind* of expense which is a "reasonable" traveling expense. The Court said (p. 470):

> "The expense must be a reasonable and necessary traveling expense, *as that term is generally understood. This includes such items as* transportation fares and food and lodging expenses incurred while traveling."

The term "reasonable" as there used, obviously had nothing to do with the amount of the expenditure. It had to do with the *class* or *kind* of expenditure. As *Deputy v. du Pont* (1940), 308 U. S. 488, in defining "ordinary and necessary," makes clear (p. 496):

> "It is the *kind* of transaction out of which the obligation arose and its normalcy in the particular business which are crucial and controlling."

Limericks, Inc. v. Commissioner (5 C. C. A., 1948), 165 F. (2d) 483, which the court below also relied upon, dealt with rent. The Tax Court had disallowed the payments, not on the ground that the Commissioner was entitled to say what rent is "reasonable," but on the ground that payments masquerading "under the guise of rent," as the Tax Court found, "were in truth and in fact distributions of dividends" 7 T. C. 1129, 1136. The Fifth Circuit affirmed, pointing out, 165 F. (2d) 483, 484:

> "The Tax Court was not bound to accept the form of this transaction between a corporation and its prin-

cipal stockholder at face value, but was required to make a careful scrutiny to determine how much of the amount, if any, was actually dividends distributed *in the guise* of rent."

There is no general power in the Commissioner to pass on the "reasonableness" in amount of a taxpayer's payments.

The court below has misapplied its authority. It has amended the statute. The decision should be reviewed.

II. DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THIS COURT RELATING TO FINALITY OF JUDGMENTS.

The Court of Appeals upon the first review remanded:

"for further proceedings in accordance with the opinion filed herein" (R. Vol. IV, p. 5).

But this did not prevent the judgment acquiring the status of a final judgment. It made the opinion a part of the mandate. *Gulf Refining Company v. United States* (1925), 269 U. S. 125, 135-6. Therefore, when the court in its opinion adjudged the payments, without qualification of any kind, to be "ordinary and necessary expenses," nothing remained for the Tax Court to do but compute the tax. The judicial process was complete. When both time for review and term expired, that judgment passed forever beyond recall, *Metropolitan Water Company v. Kaw Valley Drainage District* (1912), 223 U. S. 519, 521-4, and this would be true even if the court had been in error, as *Briggs v. Pennsylvania Railroad Co.* (1948), 334 U. S. 304, 306, shows. It was too late, after the statutory time for review had passed and the term had expired, for the court to add qualification of any kind to that judgment.

The court below has exceeded its power.

III. COURT BELOW HAS DEPARTED FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The Court of Appeals has imported a new rule into the law; it has also imported a new issue into this case.

The payments in question were not disallowed on the ground that, if held to be "ordinary and necessary expenses"—as they have been—they were unreasonable in amount. They were so challenged only if held to be compensation—as they have not been—and then only with respect to 438 named employees out of 979. The statutory notice is explicit (R. Vol. III, pp. 612, 613, 635). The trial proceeded on that basis (R. Vol. II, pp. 87-8). The Tax Court noted that "if not of that character [i.e., compensation], no necessity of inquiring as to their reasonableness exists" (R. Vol. I, p. 34). The Court of Appeals upon the first review did nothing to change this (R. Vol. IV, p. 107). Upon the remand the Tax Court was asked to deal with the alternative issue and pass on the amount only "if it is in the nature of compensation" (R. Vol. IV, p. 13). No one suggested there was any such issue in the case as the Court of Appeals has now introduced (R. Vol. IV, pp. 7-43). It was understood that if the payments were "allowable on some ground other than as compensation, the question of reasonableness, as the Commissioner concedes, is no longer here" (R. Vol. IV, p. 17). The Tax Court so understood (R. Vol. IV, p. 47); that is what it ruled upon (R. Vol. IV, p. 49).

The Court of Appeals has decided an issue not in the case.

For the Court of Appeals, after a seven-year litigation has terminated in a final judgment, to reopen the case for litigation afresh upon an issue not raised, is such a departure from the usual and accepted course of judicial proceedings as to call for the exercise by this Court of its revisory power.

CONCLUSION.

The writ should issue.

Respectfully submitted,

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